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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1908.

No. 436.

THE UNITED STATES, APPELLANT,

vs.

EDWIN E. MARVIN.

APPEAL FROM THE COURT OF CLAIMS.

BRIEF FOR APPELLEE.

CHARLES C. LANCASTER,
Counsel for Appellee.

IN THE

SUPREME COURT OF THE UNITED STATES.

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BRIEF FOR APPELLEE.

STATEMENT OF THE CASE.

Fees of a Clerk of the District Court of the United States for the District of Connecticut.

The facts as found by the court below are as follows:

COURT OF CLAIMS OF THE UNITED STATES.

No. 29845.

EDWIN E. MARVIN

vs.

THE UNITED STATES.

This case having been heard by the Court of Claims the court, upon the evidence, makes the following

Findings of Fact.

I.

During the times hereinafter mentioned the claimant, Edwin E. Marvin, was clerk of the District and Circuit Courts of the United States for the District of Connecticut.

II.

For services on behalf of the United States during the period from July 1, 1900, to April 1, 1906, the claimant made up his supplemental accounts, duly verified, and presented the same to the United States Court for approval in the presence of the district attorney, and orders approving the same as being just and according to law were entered of record. Said accounts were then presented to the Attorney-General and the accounting officers of the Treasury Department for payment, and the payment of the items embraced in Finding III was refused.

III.

Said items, the payment of which was so refused, were alleged to be for attendance on court while actually in session during the terms, or when business was transacted in court upon order of the judge, and were for 107 days at $5 per day, making $535.

The business so transacted was the reference by the clerk to the referee of voluntary petitions in bankruptcy filed during the absence of the judge from the district. No written orders were received by the clerk to open the court for the purpose of making said references, or for any other purpose; the judge was not personally present, and no writs, orders, or decrees were received from the judge sitting in chambers. The journal made by the claimant does not show that the court was open on any of the days for which per diems were claimed. The claimant, after learning of the decision of the Court of Claims in the Owen case (41 C. Cls. R., 69), went back to his district court journal, and on the last day of every

month over which his account extended interlined the days in such month upon which he had made references, merely stating them as days in which court business in bankruptcy proceedings was transacted.

Conclusion of Law.

Upon the foregoing findings of fact the court decides, as a conclusion of law, that under the Owen case (41 C. Cls. R., 69) and the Finnell case (185 U. S., 236) the claimant is entitled to a judgment for five hundred and thirty-five dollars ($535).

BY THE COURT.

The order of court approving the account referred to in Finding II was as follows:

"At a stated term of the Circuit Court of the United States for the District of Connecticut, held at Hartford, within and for said district, on the 4th day of June, A. D. 1906.

"Present: Hon. James P. Platt, district judge.

"Whereas E. E. Marvin, clerk of the United States District Court for the District of Connecticut, has rendered to this court an account for his official services from the 1st day of June, 1900, to the 1st day of April, 1906, in the presence of the district attorney, and has by his oath attached to the account proved to the satisfaction of the court that the services therein charged have been actually and necessarily performed as therein stated; and whereas said charges appear to be just and according to law, it is hereby ordered that said account, amounting to five hundred and seventy dollars ($570), be and the same hereby is approved for audit. *It is hereby certified that upon each day for which a per diem is charged in this account the court was opened for business and court business transacted in bankruptcy matters as stated.*

"Witness the Honorable Melville W. Fuller, Chief Justice of the United States, and the seal of said Circuit Court, at Hartford, in said district, this 4th day of June, A. D. 1906.

"[SEAL.] R. F. CARROLL,
"Dep. Clerk."

A certified copy of this order attached to the account of claimant is on file in the Court of Claims.

ARGUMENT.

The services performed by the appellee were authorized by section 18, paragraph *g*, of the bankruptcy act (30 Stats., 551), which provides as follows:

"*g*. Upon the filing of a voluntary petition the judge shall hear the petition and make the adjudication or dismiss the petition. If the judge is absent from the district, or the division of the district in which the petition is filed at the time of the filing, the clerk shall forthwith refer the case to the referee."

On the days for which a per diem is claimed the business transacted was the making and entering of orders of reference of bankruptcy petitions to the different referees in the district when the judge of the court was absent from the district, on Form No. 15, prescribed by the Supreme Court under section 30 for proceedings under section 18, paragraphs *f* and *g*, of the bankruptcy act, which form is as follows:

(Form No. 15.)

Order of Reference in Judge's Absence.

In the District Court of the United States for the District of Connecticut.

In the Matter of —— ——. In Bankruptcy.

Whereas on the — day of ——, A. D. 190–, a petition was filed to have —— ——, of ——, in the county of —— and district aforesaid, adjudged a bankrupt according to the provisions of the acts of Congress relating to bankruptcy; and whereas the judge of said court was absent from said district at the time of filing said petition; it is thereupon

Ordered that the said matter be referred to one of the referees in bankruptcy of this court, to consider said petition and take such proceedings therein as are required by said acts; and that the said —— —— shall attend before said referee on the — day of ——, A. D. 190–, at ——.

Witness my hand and the seal of the said court, at ——, in said district, on the — day of ——, A. D. 190–.

[SEAL OF THE COURT.] —— ——, *Clerk.*

Appellant's objection is that the journal does not show that the court was open on the days claimed, that the judge was not present, that no orders or decrees were received from the judge to be entered, and that all the claimant did was to refer voluntary petitions in bankruptcy to a referee as directed by the bankruptcy act (30 Stats., 551), section 18, paragraph *g*.

The answer to these objections is clear and conclusive both in fact and law.

In the first place, the Supreme Court in the Finnell case (185 U. S., 236), and the Court of Claims in the Owen case (41 Ct. Cls., 69), decided that the court is always open for the transaction of business under sections 574 and 828, Revised Statutes, and section 2 of the bankrupt act (30 Stats., 545), and therefore it was not necessary for the clerk to make any entry of the opening and adjourning of court on the days claimed.

As a conclusive fact, and to set at rest any doubt as to whether the court was open and bankruptcy business transacted on the days claimed, the judge of the court in the order approving the account of claimant certifies as follows:

"It is hereby certified that upon each day for which a per diem is charged in this account, the court was opened for business and court business transacted in bankruptcy matters as stated."

U. S. *vs.* Jones, 134 U. S., 483.

In Butler *vs.* U. S., 87 Fed. Rep., 658, where a similar question was under consideration, Judge Baker decided as follows:

"Chancery, admiralty, and bankruptcy courts are in session during these regular and special terms, and they also sit, and therefore are in session whenever and wherever the judicial business which is described in sections 574, 638 and 4973 of the Revised Statutes, and in section 16, act Feb. 4, 1887, is actually transacted by one or more of the judges of these courts. In all of these cases, when a court is in session during a regular or special term, or *when it is in session by*

reason of the transaction of business under the sections aforesaid, it is equally necessary that its clerk should be in attendance upon it, with its records at the place where the records are kept by him, to receive the orders, decrees and rules of the court, and its instructions concerning them. If no business were transacted at a regular or special term, his attendance would be necessary; *and it is always necessary when business is transacted in or by the court.*"

In the same case, page 663, in reviewing the jurisdiction and powers of the District Court under section 574 and others, the judge said:

"A review of the decisions and text-books discloses that, under a constitution which vests the judicial power in courts, it cannot be vested by the legislature anywhere else; that, where an exercise of judicial power by a judge is authorized by the legislature, it is held to have meant the court of which he is a judge; that his acts and proceedings in such a case are the acts and proceedings of the court itself; that the business which is transacted by him is actually transacted in court. It also appears that where a legislature has gone further, and specifically declared that a court shall be 'always open' for the transaction of particular business, and that, so far as that particular business is concerned, the terms of the courts shall be practically continuous and without any vacations between them, the power of the legislature to do so, and to make the acts and proceedings of a judge in pursuance of his authority the acts and proceedings of the court itself, has never been denied by any court where these questions have been presented for its consideration. A reason for such legislation by Congress exists in the fact that judicial power, under the Federal Constitution, is vested in courts only. The power to ordain and establish inferior courts is vested in Congress, and it, accordingly, regulates the scope and boundaries of their jurisdiction, prescribes the number of the judges by whom they shall be held, and determines generally the conditions under which the judicial power that is vested in them shall be exercised. It fixes the time and place for holding regular terms of the courts, and it authorizes the courts or the judges to fix the time and place for holding special terms of the courts; and *it authorizes the courts to sit in chambers for the transaction of an im-*

portant part of their business whenever and wherever they deem it necessary or proper to do so (Rev. St., sections 572, 574, 576, 581, 638, 661, 664, 666, 668–670, 4973, and act Feb. 4, 1887, sec. 16). A single judge may hold a court, and exercise the judicial power that is vested in it, under the conditions that are prescribed by Congress. But, whenever judicial power is exercised by a judge in accordance with these conditions, it is exercised by him as a court, or it is unauthorized by any constitutional authority. His acts in the exercise of judicial power are, in short either acts of a court, or they are absolutely void."

APPROVAL OF THE DISTRICT COURT.

As a final and conclusive proof that the court was open and held during the term on the dates for which the per diems are claimed, that business was transacted in court, and that the clerk was in actual attendance on said court, attention is called to the fact that the account of claimant containing these per diems was presented in open court with the same district judge presiding, in the presence of the district attorney, who represented the Government, and with his consent an order was duly made approving said account as being *just and according to law,* and the same was entered of record.

In United States *vs.* Jones, 134 U. S., 483, the Supreme Court held that "the approval of a commissioner's account by a circuit court of the United States under the act of February 22, 1875 (18 Stats., 333), was *prima facie* evidence of the correctness of the items of said account, and in the absence of clear and unequivocal proof of mistake on the part of the court, it should be conclusive."

This doctrine was affirmed in U. S. *vs.* Nix, 189 U. S., 206, where the court say:

"We adhere to that view. It would be an insupportable burden upon the officers of courts if, every time a question was made before the accounting officers of the Treasury of the correctness of their account, they were required to produce affirmative evidence of every item. This was evidently not contemplated by the statute."

Counsel for appellant in his brief is in error when he asserts that all the claimant did was to refer the petitions to the referee as a matter of course, and he would have the court infer that the claimant simply pulled out the petitions from the files of the court and sent them to the referee by mail or messenger.

This is not the fact, as the proof shows, nor is it in compliance with the bankruptcy law and the rules of the Supreme Court prescribed for such proceedings, which require that the reference shall be done by *order of court, duly entered on its records according to the practice of the court.* The proceeding is both judicial and clerical, but both are separate and necessary. These facts constitute business transacted in court, which is always open and on which the clerk was actually and necessarily in attendance, and, in consequence, legally entitled to his per diem for attendance thereon.

Authorities relied on:

U. S. *vs.* Jones, 134 U. S., 483.
U. S. *vs.* Finnell, 185 U. S., 236.
U. S. *vs.* Nix, 189 U. S., 206.
Butler *vs.* U. S., 87 Fed. Rep., 658.
Owen *vs.* U. S., 41 Ct. Cls., 69.

On all the facts and the law of the case, it is submitted that this appeal should be denied and the judgment affirmed.

CHARLES C. LANCASTER,
Counsel for Appellee.

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No. 437 to 444 incl

No

Records

or

Briefs